IN THE COURT OF APPEALS OF IOWA

No. 1-119 / 10-0976
Filed March 30, 2011

Upon the Petition of
CYNTHIA MARIE ROGAN,
Petitioner-Appellee,

And Concerning
HEATH CHARLES DEWEESE,
Respondent-Appellant.

Appeal from the Iowa District Court for Greene County, William C. Ostlund, Judge.

Respondent appeals the district court's decision denying his petition to modify the physical care provision of the parties' stipulated paternity decree. **AFFIRMED.**

Sasha L. Monthei of Scheldrup Blades Schrock Smith Aranza, P.C., Cedar Rapids, for appellant.

Mark J. Rasmussen, Jefferson, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

Heath DeWeese and Cynthia Rogan are the parents of a child born in March 1999. The parties were never married, but lived together for a period of time, and separated in 2002. On October 19, 2001, Cynthia filed a petition to establish paternity and child support. Heath admitted paternity. The parties entered into a stipulation, which was approved by the court, that they would have joint legal custody, with Cynthia having physical care. Heath was granted visitation and ordered to pay child support of $398 per month.

On January 8, 2008, Heath filed an application to have Cynthia found to be in contempt for failing to abide by the visitation provisions of the paternity decree. Cynthia admitted the visitation schedule had not been followed. The district court found Cynthia was in contempt. She was sentenced to five days in jail, but was permitted to purge the sentence by complying with the visitation schedule in the paternity decree.

Heath filed an application on August 21, 2009, to modify the physical care provision in the paternity decree. He asserted Cynthia had moved many times after the parties separated, and the child had attended several school districts. He stated the child had also missed school on too many occasions. He stated Cynthia did not keep her home clean, and she did not provide adequate clothing for the child during visitation. Heath also raised concerns about Cynthia's male companions.

The modification hearing was held on April 20, 2010. Heath testified he had a high school degree and was finishing a two-year degree at DMACC. He was employed at Carroll Coolers as a foaming operator, and earned $13.75 per hour. Heath also was a member of the National Guard, which required his participation one weekend each month and two weeks during the summer. Heath lived in a two-bedroom home in Carroll with his fiancée, Katie Gehling. Katie was a registered nurse. She and Heath were expecting a child in July 2010.

Cynthia moved several times after the parties separated in 2002. She moved from Des Moines to Jefferson, then to Glidden, where she got a different job. Cynthia and James Fogelsong had a child together in 2004. They lived together for a period of time in Carroll. Cynthia separated from James and moved to Bagley with Michael Eastman.[1] Cynthia then moved to Cedar Rapids to obtain better medical care. She moved to Scranton for eight months to take care of her father and grandfather. When James got out of prison in January 2010, after serving time for domestic abuse assault,[2] Cynthia moved to Linden to live with him. She was employed at a Subway restaurant in Panora, where she worked thirty-two hours per week and received eight dollars per hour.

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[1] Michael had a lengthy criminal history. Cynthia separated from him after an incident of domestic abuse.

[2] James also has a lengthy criminal history. Most recently he was convicted of domestic abuse assault, third offense, for picking up a chair and striking his girlfriend over the head with it, causing her a cut and a broken hand. At the time of the modification hearing James was on parole and was subject to random drug tests. He testified he was not going back to his previous lifestyle, which had involved drinking and illegal drugs.

The parties' child made all of these moves with Cynthia. The child attended preschool in Coon Rapids, and then switched from Carroll, to Panora, to Cedar Rapids, and then back to Panora school districts. The child had missed school for several days each year.[3] Cynthia testified this was because the child suffered from headaches. The parties' child, who was eleven at the time of the modification hearing, and Cynthia's other child, who was then six, were very close. The parties' child informed the judge she wanted to remain with her mother.

The district court denied Heath's request for modification, finding he had not shown there had been a substantial change in circumstances.[4] The court noted Heath had legitimate concerns about the child's absenteeism from school, Cynthia's boyfriends, and problems with communication. The court determined, however, "the issues raised appear to be either unsubstantiated or credibly contradicted." The court found the child was doing quite well in school, and she was a "happy, well-adjusted, friendly young lady." The court stated that while not dispositive, the child had expressed a clear desire to live with Cynthia. Heath appeals the district court decision denying his request for modification of physical care.

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[3] There was evidence the child had missed eighteen days of kindergarten, at least nineteen days in first grade, 20.5 days in second grade, 27.5 days in third grade, and twenty-four days in fourth grade. In fifth grade, until the time of the hearing in April, she had missed 9.5 days.

[4] Heath points out that the court made a factual finding that was not supported by the record. The court stated, "An alarming fact surfaced that Heath had purchased methamphetamine for Cynthia while pregnant with [the child]." In fact, Cynthia admitted she smoked marijuana when she was pregnant with the child, and stated, "Heath bought it for me." There was no evidence that would raise concerns about current drug use by either party.

II. Standard of Review

Issues ancillary to a determination of paternity are tried in equity. *Markey v. Carney*, 705 N.W.2d 13, 20 (Iowa 2005). We review equitable actions de novo. Iowa R. App. P. 6.907. We review both the facts and the law anew and draw our conclusions from our review of the record. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). When we consider the credibility of witnesses in equitable actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Physical Care

Heath contends the district court should have modified the parties' paternity decree to place the child in his physical care. He claims there has been a substantial change of circumstances due to the child's absenteeism from school, the presence of James in Cynthia's home, Cynthia's frequent relocations, ineffective communication between the parties, and Cynthia's interference with his visitation. Heath asserts he can render superior care because he is a more stable parent. Heath states the child's preference to live with Cynthia should not be given undue weight. He also states that it is preferable for the child to live with him, even though she will be separated from her sibling.

In issues concerning custody and physical care, we employ the same criteria regardless of whether the parties were married or unmarried. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). A party seeking to modify physical care must first show a substantial change in circumstances since the entry of the decree or any subsequent intervening proceeding that considered

the situation of the parties upon application for the same relief. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The party must show that because of the change in circumstances, continued enforcement of the degree would result in positive wrong or injustice. *Id*. at 565. The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

A parent seeking to modify the physical care provision of a decree has a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). "A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This heavy burden is imposed based on the principle that once physical care of a child has been fixed it should be disturbed only for the most cogent reasons. *Id.*

The district court carefully addressed each of Heath's concerns. On the issue of school attendance, the court found that while this was "a red flag any parent should address," there was a legitimate medical cause of the child's absenteeism. Cynthia testified the child had headaches that kept her home from school. The child's elementary school counselor, Julie Geistkemper, testified she did not have any concerns about the child. The child's teacher, Rachel Downing, testified she did not believe the child's attendance was abnormal. Downing testified the child got along with all of her classmates, and she was a "very bright girl," who got good grades. The evidence showed the child's absenteeism was improving, because she had missed fewer days in fifth grade, 9.5, than in

previous years. We agree with the district court's conclusion that the child was not negatively impacted by absenteeism from school.

Another issue was the presence of James in Cynthia's home. The district court stated it was "impressed with the management classes that he is taking to address his demons." The court found James to be a very sincere and credible witness when he was asked about his past problems. James testified that he had problems in the past because he kept drinking and using drugs, "[a]nd this time I'm not going back to that lifestyle." The court had the advantage of observing James, and we give weight to the court's determination of credibility. *See* Iowa R. App. P. 6.904(3)(*g*). We agree with the court's conclusion James was not a threat to Cynthia or the children at that time.

Another concern raised by Heath was the fact Cynthia had moved several times, necessitating the child to be enrolled in different school districts. Cynthia stated she moved either to get a better job or better housing. One of her relocations was to take care of her father and grandfather, who needed her help. There was no evidence these moves were detrimental to the child, or had negatively impacted her education.

Heath complained Cynthia did not share information with him regarding the child, especially concerning activities and progress in school. However, as noted by Cynthia, Heath, as a joint legal custodian, had equal access to information about the child.[5] *See* Iowa Code § 598.41(1)(e) (2009). The court

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[5] Under section 598.41(1)(e), unless otherwise ordered by the court in a custody decree, "both parents shall have legal access to information concerning the child,

found communication had improved since the 2008 contempt action and "it is likely to continue to improve." The court also found, "this communication can be improved and a stable family life for both Cynthia and Heath may be a major factor in that accomplishment." We agree with the court's conclusion that communication between the parties is improving, and should continue to improve.

Related to the issue of communication is the issue of visitation. Heath stated he had difficulties in obtaining visitation at times. As noted above, Cynthia had been found in contempt in January 2008 for failing to abide by the visitation provisions of the paternity decree. At the modification hearing Cynthia pointed out that because Heath was in the National Guard his schedule was subject to change. The court agreed with Cynthia's contention that since 2008 missed visitation had been due to Heath instead of Cynthia. Cynthia agreed that the child could communicate with Heath whenever she wanted. We determine Heath has not shown there was a substantial change in circumstances, of any more or less permanent nature, with regard to visitation.

The child told the judge, "I really want to live with my mom." The court noted this, stating, "[w]hile not dispositive, [the child] expressed a clear desire to live with her mother." A child's preference is given less weight in a modification proceeding than in an original custody proceeding. *See In re Marriage of Thielges*, 623 N.W.2d 232, 239 (Iowa Ct. App. 2000). We do not believe the

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including but not limited to medical, educational and law enforcement records." There is no court order in the record curtailing either parent's access to this information.

court gave undue weight to the child's preference. On appeal also, this is one factor, among many, to be considered by the court.

Another factor to be considered is the potential separation of this child from her sibling, the child of Cynthia and James. There was evidence the two girls were very close. They had been living together since the younger child was born in 2004. There is a presumption that siblings should not be separated from one another without good and compelling reasons. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). This principle also applies to half-siblings. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993).

Whether or not Heath has shown there has been a substantial change in circumstances, we conclude he has not shown he can minister more effectively to the child's well-being. *See Frederici*, 338 N.W.2d at 158 ("A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being."). We concur in the district court's finding that the child was "a happy, well-adjusted, friendly young lady who is doing quite well in school." The child's school teacher testified she was doing well in school and got along with the other children. Once physical care of a child has been fixed it should be disturbed only for the most cogent reasons. *Id.* The evidence does not present any cogent reasons for disturbing the present physical care arrangement. We affirm the district court's decision denying the request to modify physical care.

IV. Attorney Fees

The district court ordered Heath to pay $500 for Cynthia's trial attorney fees. On appeal, Heath contends the award of attorney fees was an abuse of discretion. Under Iowa Code section 600B.25(1), a prevailing party may be entitled to attorney fees.[6] The decision to award attorney fees to a prevailing party in a paternity action rests within the sound discretion of the court. *Markey*, 705 N.W.2d at 25. We will not reverse unless there has been an abuse of discretion. *Id.* We do not find the district court abused its discretion in awarding Cynthia $500 in trial attorney fees.

We affirm the decision of the district court. Costs of this appeal are taxed to Heath.

AFFIRMED.

[6] Attorney fees may be awarded not only in an original paternity action, but also in an action to modify the paternity decree. *See, e.g., Audas v. Scearcy*, 549 N.W.2d 520, 523 (Iowa 1996) (directing the district court to award attorney fees on remand in an action to modify a paternity and support order).